Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	))	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	))))	MB Docket No. 07-18

To: The Commission

REPLY COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association (APPA) respectfully submits these reply comments in response to the Federal Communications Commission (FCC)'s *Notice of Proposed Rulemaking* (*NPRM*) in the above captioned proceeding. The FCC seeks comment on whether extending the prohibition on exclusive contracts between vertically integrated video programming vendors and cable operators, set forth in in Section 628(c)(2)(D) of the Communications Act, is necessary to preserve and protect competition in the distribution of video programming.

As discussed below, APPA concurs in the overwhelming support for the further extension of the prohibition on exclusive contracts, as expressed by a wide range of commenters in this proceeding. The prohibition has been, and continues to be, a critical tool in ensuring that consumers get the true benefits of competition among multichannel video program distributors (MVPDs). This is particularly true for small, new competitive entrants.

I. INTRODUCTION

APPA is a national service organization that represents the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Austin, Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle, and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately 70 percent of APPA's members serve communities with less than 10,000 residents. At present, over 100 public power systems provide cable television services.

The patterns that marked the evolution of the electric power industry are now repeating themselves in the communications industry. As incumbent private communications providers focus on establishing or further entrenching themselves in large population centers, many smaller communities are at risk of falling behind in obtaining the full benefits of the Information Age. These benefits include vigorous economic development, rich educational and occupational opportunity, affordable modern health care, and high quality of life. In response, municipal utilities around the country once again have come together to serve their communities by deploying sophisticated broadband communications networks capable of providing video, voice and data services, including some of the only fully operational, community-wide, fiber to the home (FTTH) networks in the nation. Many of these networks are the result of public-private partnerships. In order for these networks to survive and fulfill the promise of meaningful competition they need to be able to offer their consumers a full slate of video choices that is comparable to that provided by their incumbent multiple system operator (MSO) competitors.

II. THE COMMISSION SHOULD RETAIN THE PROHIBITION ON EXCLUSIVE CONTRACTS

A. The Ban on Exclusive Program Contracts Continues to Be Vitally Necessary to Preserve and Protect Competition Among MVPDs

Section 628(c)(2)(D) prohibits MVPDs from entering into exclusive contracts with video programming vendors in which they have attributable ownership interests. Pursuant to Section 628(c)(5), the exclusivity ban was scheduled to sunset on October 5, 2002, unless the Commission determined that the ban "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming." Based on its assessment of the nature and status of competition in the video programming and distribution markets, the Commission has twice previously found just that – that retention of the exclusivity prohibition was necessary to preserve and protect competition.

First, in 2002, the Commission extended the ban for five years, until October 5, 2007. In reaching that decision, the Commission concluded that vertically integrated video programming vendors had both the incentive and the ability to favor their own MVPD affiliates over competitors. The Commission also found that an end to the ban would create an unacceptable risk that non-affiliated MVPDs would be denied access to programming for which no good substitute existed.[1]

[1] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, *Report and Order*, 17 FCC Rcd 12124 (2002) ("*2002 Extension Order*"), ¶¶ 3, 52.

In 2007, the Commission extended the ban for another five years.[2] In doing so, the Commission found that the major MVPDs and their affiliated programming vendors retained the ability and incentive to harm competition by entering exclusive arrangements with each other, and that developments in the market over the preceding five years had not materially changed this.[3] Among other concerns, the Commission noted a small number of MVPD-affiliated programmers had substantial control over popular national programming and regional sports networks (RSNs) that are in high demand by MVPD subscribers.

Now, observing in the NPRM that the market share of the major MVPDs has declined, the Commission has asked whether conditions have finally changed enough to warrant eliminating or relaxing the prohibition. On behalf of all current and potential public providers of video programming services, APPA submits that the answer is clearly "No." Absent the ban, vertically-integrated MVPDs and their affiliated video programing vendors would continue to have the means and the incentive to use exclusive contracts to frustrate competition.

While the market share of the major MVPDs may have declined somewhat, that has not obviated the need for the exclusivity ban. As AT&T notes, the growth in MVPD competition has not fundamentally altered the market structure and conditions in the video programming market that led Congress to adopt the exclusivity prohibition in 1992, and led the Commission to extend that limitation in 2002 and 2007.

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2 *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Report and Order*, 22 FCC Rcd 17791, ¶¶ 1, 12-14 (2007) ("*2007 Extension Order*"), *aff'd sub nom. Cablevision Sys. Corp. et al. v. FCC*, 597 F.3d 1306, 1314-15 (D.C. Cir. 2010).

3 *Id.*, ¶ 37.

Programming access is critical to viable competition. Congress and the Commission have long recognized the direct linkage between access to programming and competition. As Free Press notes, absent the ability to obtain programming pursuant to Section 628, there is little doubt that Direct TV, Echo Star, AT&T, or Verizon would not have entered into the MVPD market. This is also certainly true for public cable systems. Despite the beachhead that various competitors have made in providing competitive video services, large powerful MVPDs continue to have dominant influence over "must have" cable programming, without which competitors cannot survive in the market.

As the American Cable Association (ACA) noted in its opening comments, the large multi-system operators continue to dominate the video marketplace. In fact, as the Commission's own data confirm, the market condition that is most relevant here – i.e., the extent to which the major vertically-integrated MVPD's control the most popular video programming – has changed very little since 2007. As ACA observes,

> The current data demonstrates that four of the five top cable operators in terms of subscribers hold ownership interest in satellite delivered national programming networks. This is little changed since 2007 when the four largest cable operators controlled satellite delivered national networks. The data further shows that in 2011, vertically integrated cable operators had an interest in 7 of the top 20 satellite delivered national programming networks (as ranked by subscribership). This represents an increase in the number of top 20 satellite delivered national programming networks affiliated with cable operators since 2007.[4]

If anything, the Commission's data regarding "must have" RSNs suggests that the grounds for concern are *increasing* rather than diminishing. Between 2007 and 2011, the percentage of RSNs affiliated with MVPDs increased by 6.3 percent, from 46 percent to 52.3 percent, with most of the RSNs in question affiliated with the same four cable operators.[5]

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[4] ACA, at 6, citing to Appendix A and B of the *NPRM* and the *2007 Extension Order*.

[5] *Id.*, at 7.

In short, nothing has changed in the market that would justify a different conclusion than the Commission reached in extending the ban in 2002 and 2007. As long as the major vertically-integrated MVPDs continue to wield overwhelming market power, the Commission should do nothing to undermine the ban, which has preserved and protected competition in the video programming distribution market since its enactment in 1992.

B. Continued Access to Programming Also Impacts Viability of Broadband

While the *NPRM* focuses on the potential impact of removal of the exclusivity ban primarily in the context of video service competition, the Commission should also consider the impact that removing the ban would have on the national goal of accelerating broadband deployment, adoption, and use. As the Commission has repeatedly recognized, most recently in its *Terrestrial Order*, "by impeding the ability of MVPDs to provide video service, unfair acts involving [video service] can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving [video service] to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a priority for the Commission. This secondary effect heightens the urgency for Commission action."[6]

In its National Broadband Plan, the Commission announced a national goal of achieving 100 megabits to 100 million households by 2020 as part of its National Broadband Plan.[7] In describing this goal, Chairman Julius Genachowski stated that the United States should also seek to push past 100 Megabits as fast as possible.

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6 *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, ¶ 36, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (footnotes omitted).

7 *Connecting America: The National Broadband Plan*, Federal Communications Commission, released March 16, 2010, http://www.broadband.gov/plan/.

> The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future.[8]

Some of APPA's members are already providing ultra-fast broadband connectivity at 100 Mbps – nearly a decade ahead of the Commission's proposed national goal – and many others will be capable of doing so long before 2020. These systems will increasingly provide multiple benefits to their communities and the Nation, including support for robust economic development and global competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life.

For all this to occur, however, APPA's member utilities must be able to pay for their systems. To do that, they must be able to provide, or support the provision, of all major communications services, including video services. They must therefore have fair and reasonable access to national and regional video programming. Removing the exclusivity ban would therefore jeopardize not only their ability to provide competitive video services, but also their ability to provide the high-capacity broadband services and capabilities that their communities and the Nation require.

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8 Julius Genachowski, "Broadband: Our Enduring Engine for Prosperity and Opportunity," as prepared for delivery at NARUC Conference, February 16, 2010, http://tinyurl.com/yc6j2l8.

C. Section 628(b) Is Not an Adequate Substitute for the Current Prohibition on Exclusive Contracts for Cable Affiliated Satellite Programming

The FCC notes that "[e]ven if the exclusive contract prohibition were to sunset (wholly or partially), an MVPD would still have the option to file a complaint with the Commission alleging that an exclusive contract between a cable operator and a satellite-delivered, cable-affiliated programmer involving satellite-delivered, cable-affiliated programming violates" Section 628(b).

Under Section 628(b) cable operators, and others acting in concert with them are prohibited from engaging in any form of unfair or deceptive conduct:

> (b) Prohibition.-- It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

In the *NPRM*, the Commission observes that Section 628(b) is the mechanism through which it reviews complaints from MVPDs that exclusive contracts for terrestrially delivered programs are "unfair acts" and seeks comment as to why Section 628(b) would not also be sufficient for reviewing complaints about exclusive contracts for satellite delivered programming.

APPA does not believe that Section 628(b) is an adequate substitute for the Congressionally mandated protections afforded by Section 628(c)(2)(D). First, as the Commission itself has previously found, Section 628(b) "carries with it an added burden" to demonstrate that the "purpose or effect" of the "unfair act" is to "significantly hinder or prevent" an MVPD from providing programming.[9] This would effectively flip the presumption on the legality of the exclusive contract and places the burden on competitive MVPD in contravention

[9] *2002 Extension Order,* ¶ 65 n.206.

of Congressional intent. Further, bringing unfair competition complaints would be difficult, time consuming, and costly undertakings that few small to medium MVPDs have the resources for. That is particularly so because the MVPDs would have to bring a separate complaint for each video service denied to them. That would be a crushing burden that would surely stop competition in its tracks.

III. CONCLUSION

Based on all of the above, APPA submits that the exclusivity prohibition continues to be necessary to the preservation and protection of competition in the video distribution market today and therefore should be extended for an additional five-year term.

Respectfully submitted,

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